Chotteylal Vs. Hari Kishen

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Court : Rajasthan

Decided On : Aug-17-1955

Reported in : AIR1956Raj45

Judge : Sharma, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 1, Rule 10, 10(1) and 10(3) - Order 41, Rule 33

Appeal No. : Second Appeal No. 283 of 1951

Appellant : Chotteylal

Respondent : Hari Kishen

Advocate for Def. : G.P. Kasliwal, Adv.

Advocate for Pet/Ap. : G.N. Sharma, Adv.

Disposition : Appeal partly allowed

Judgement :

Sharma, J.

1. This in an appeal by Chotteylal defendant against the judgment and decree of the learned District Judge, Jaipur City in a suit for the recovery of Rs, 2120/- on a pronote. The suit was originally filed by Harikishendass respondent 1 against the appellant Chottelal on the allegations that a pronote for Rs. 2000/- was executed by the appellant in favour of respondent 2 Kishenchand Lekhraj on 1-10-1948.

The consideration was, however, really paid by Harikishendass and it was for his benefit that the pronote was executed. Kishenchand was made a defendant pro forma in the suit. A prayer was made for the recovery of Rs. 2000/- principal and Rs. 120/-interest i.e. for the total sum of Rs. 2120/-. This suit was filed on 20-5-1949 in the Court of the Civil Judge, Jaipur City.

2. The principal respondent Chotteylal filed his written statement pleading that the pronote in suit was inadmissible in evidence being insufficiently stamped. It was further pleaded that no suit could be filed by Harikishendass who was the holder of the pronote in suit. It was also pleaded that all the partners of the firm Kishenchand Lekhraj were parties to the suit and, therefore, it was bad for non-joinder of necessary parties. Lastly, it was pleaded that as the pronote did not bear any interest, no interest could be charged.

3. After the above written statement had been filed, an application was made by Harikishendass plaintiff on 16-1-1950 and it was prayed that the pro forma respondent Kishen Chand Lekhraj be transposed as plaintiff and the plaint be amended accordingly. On behalf of Kishenchand Lekhraj, one Ishardass representing himself to be Mukhtaram of Kishenchand Lekhraj consented to the transposition of the pro forma defendant as plaintiff 2.

The principal defendant Chotteylal too raised no objection and only prayed for costs. The Court awarding Rs. 14/- as costs to the principal defendant Chotteylal made the required amendment and transposed Kishenchand Lekhraj as plaintiff 2. Ultimately the first Court held that the pronote in suit was insufficiently stamped and so no suit could be decreed in favour of Kishenehand Lekhraj on the basis of the pronote. Harikishendass was, however, given a decree for Rs. 2080/- on the original cause of action.

4. Chotteylal filed an appeal in the Court of the learned District Judge, Jaipur City. Harikishendass filed cross-objections as no costs were allowed to him. The learned District Judge held that the pronote was sufficiently stamped and, therefore, gave a decree to Kishenehand Lekhraj on the basis of the pronote holding that Harikishendass was not the holder of the pronote and a decree could not be given in favour of a Benamidar. However, it was old that Kishenchand Lekhraj being holder of the pronote was entitled to a decree on the pronote. Kishenchand Lekhraj was, therefore, given a decree for Rs. 2080/- against Chotteylal on the pronote. Costs were also allowed to the plaintiff.

5. The principal defendant Chotteylal has come in second appeal to this Court. I have heard Sri G.N. Shamia on behalf of the appellant and Sri G.C. Kasliwal on behalf of the respondent. The following are the points for determination in appeal:

(1) Whether the suit could have been brought in the name of the benamidar Harikishendass?

(2) Whether the first Court was justified in transposing Kishenchand Lekhraj as one of the plaintiffs?

(3) Whether the lower appellate Court was justified in awarding a decree to Kishenchand Lekhraj against whom the suit was dismissed by the first Court and who had preferred no appeal or cross-objections against the decree of the first Court and

(4) Whether the lower appellate Court wasjustified in awarding costs on the cross-objections of Harikishendass against whomthe suit was dismissed by it?

6. Taking up the point No. 1, first, it wasargued by Mr. G.N. Sharma that under Section 8, Negotiable Instruments Act, the holder of a promissory note..... means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Under Section 78 of the said Act subject to the provisions of Section 82, Clause (c) payment of the amount due on a promissory note ..... must, in order to discharge the maker or accepter, be made to the holder of the instrument. Harikishendass was not the person entitled in his own name to the possession of the pronote and to receive or recover the amount due thereon from the maker.

According to Section 78 any payment made to the Lenamidar Harikishendass could not discharge the maker Chotteylall. No decree could therefore be given in favour of Harikishendass. So tar as this argument of the learned counsel is concerned, it has been accepted by the lower appellate Court and no decree has been given to Harikishendass. Decree has been given to Kishen Chand Lekhraj who is undoubtedly holder of the pronote and payment to whom could legally discharge the maker Chotteylal, Sri G.C. Kasliwal also did not challenge the finding of the lower appellate Court on this point. The relief prayed for was, therefore, rightly disallowed to Harikishendass.

7. Coming to the second question, it was argued by Sri G.N. Sharma that at first Kishenchand Lekhraj did not join as one of the plaintiffs. He was, therefore, arrayed as pro forma respondent. Later on, however, he was transposed as one of the plaintiffs. Consent was given by Ishardass whose power of attorney did not give him power on behalf of Kishenchand Lekhraj to prosecute any suit like the present. Ishardass was only authorised on behalf of Kishenchand Lekhraj to act as attorney to carry on the business of the concerns styled No. 1- Tndian Art Museum, Jaipur and No. 2 - Rajputana Carpets and Company, Jaipur for the following purposes;

(1) to recovery payments and pass valid discharges for the same;

(2) to institute any proceedings in any Court or before any tribunal, civil, original, or appellate and to conduct the same for the dealings of the above businesses; and

(3) to appoint any legal adviser, solicitor or attorney for the above firms and to discharge him and to appoint another....

It was argued that it was clear from the terms of the above deed of attorney that Ishardass had power only to act, appear and prosecute cases relating to Indian Art Museum, Jaipur and Rajputana Garpets and Company, Jaipur. The pronote in suit did not relate to any of the above two businesses and, therefore, Ishardass had no authority to act on behalf of Kishenchand Lekhraj in the present suit. The consent of Ishardass was, therefore, of no effect. It was argued that a defendant cannot be transposed as plaintiff without his consent and as there was no consent for the transposition of Kishenchand Lekhraj as plaintiff, the suit on behalf of Kishenchand Lekhraj could not be maintained and no decree could be given to him.

8. There is no doubt that Ishardass held he power of attorney on behalf of Kishenchand Lekhraj for a limited purpose only and he could represent his principal only so far as the businesses of Indian Art, Museum and Rajputana Carpets and Co., were concerned. The present suit did not relate to any of these two businesses and, therefore, Ishardass could not validly represent Kishenchand Lekhraj in the present suit. If any consent were legally necessary, the consent of Ishardass would not have sufficed for the transposition of Kishenchand Lekhraj.

It is also true that Kishenchand Lekhraj himself did not give any consent of his. There is nothing on the record to show that Kishenchand Lekhraj gave his own consent to his transposition as plaintiff.

The provision of the Civil Procedure Code which deals with the transposition of parties is Order 1, Rule 10. Under the said provision where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

So far as the wordings of Rule 10, Order 1 go, there ' is nothing therein that a defendant can be transposed as plaintiff or vice versa with his consent only. The only provision of Rule 10 which requires consent is Sub-rule (3) which says that no person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent. In this case Kishenchand Lekhraj was under no disability and was not being added as plaintiff suing without a next friend nor was he being added as a next friend of a plaintiff under any disability.

It is, therefore, doubtful whether the consent of Kishenchand Lekhraj in the case like the present was necessary for his transposition. Learned counsel for the appellant has cited certain rulings of some of the High Courts in order to show that for the transposition of a defendant as plaintiff his consent is necessary. It is not necessary for me to go into these rulings in this case because I find from the record that when the application was made by Hari-kishendass for the transposition of Kishenchand Lekhraj as plaintiff, the defendant Chotteylal did not raise any objection to such transposition. Rather he agreed in case he was paid costs. The Court made an Order of transposition and allowed Rs. 14/-costs to Chotteylal, which was received by him. Under the circumstances, it does not lie in the mouth of Chotteylal to object to transposition. This objection of the learned counsel for the appellant has no force.

9. Kishenchand having been made a plaintiff he was entitled to a decree on the pronote in suit.

10. The other objection which has been taken by the learned counsel for the appellant is that the suit was not decreed in favour of Kishenchand by the first Court, and it was decreed in favour of Harikishendass. An appeal was filed by Chotteylal in the lower appellate Court and Harikishendas filed cross-objections. Kishenchand

neither filed an appeal nor cross-objections against the decree of the first Court. The lower appellate Court was, therefore, not empowered to pass a decree in favour of Kishenchand after having found that the decree in favour of Harikishendass could not be maintained.

Learned counsel for the respondent relied upon Rule 33 of Order 41 under which an appellate Court has power to pass any decree and make any order which ought to nave been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents pr parties, although such respondents or parties may not have filed any appeal or objection. Now , Kishenchand Lekhraj was made a respondent by the appellant Chotteylal in his appeal before the lower appellate Court.

According to Rule 33 of Order 41 therefore the appellate Court could pass a decree in his favour notwithstanding that Kishenchand had not filed any appeal or objection. The wordings of Rule 33 are quite clear and the lower appellate Court was perfectly en-titled to make a decree in favour of Kishenchand when it came to a finding that decree ought to have been passed in his favour.

11. Learned counsel for the appellant placed reliance on the decision of their' Lordships of the Priviy Council in the case of -- 'Anathnath Biswas v. Dwarkanath Chakravarti', AIR 1939 PC 86 (A). In that case a suit was brought by some of the co-sharers alleging that in respect of the revenue sale their cosharer had been guilty of fraud or improper conduct to the prejudice of his co-owners in the estate, and contended that, by reason thereof, the purchase was one in which they could claim to share by recovering their former interest upon payment of a proportion of the purchase money. The trial judge accepted this contention and gave the plaintiffs a decree directing the co-sharer to convey to them their former share on receipt of a proportionate part of purchase price.

On appeal the decree-holder-respondents without filing any cross-objections to the decree of the trial Court claimed that the revenue sale should be set aside for want of jurisdiction or irregularity. It was held that the claim to relief was founded upon different grounds from those upon which the trial Court's decree proceeded and upon principles different from those which underlie the relief given by the decree.

The case came clearly within the condition imposed by the concluding words of Sub-rule (1) of Rule 22, 'provided he has filed such objections in the Appellate Court, etc. etc.', and Rule 33 could not rightly be used in such a case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeed in the Court below.

The facts of that case are distinguishable from the facts of the present case. In that suit what the plaintiffs had claimed was the recovery of their former interest upon the payment of a proportion of the purchase money. This contention was accepted by the trial Judge and the decree was given to the plaintiff. In the appellate Court, however, without filing any cross-objections to the decree of the trial Court the plaintiffs claimed that the whole of the revenue sale should be set aside for want of jurisdiction or irregularity. In this case the plaintiffs went beyond what they had prayed for in the plaint, and therefore, their Lordships held that the trial Court was not justified in giving that relief to them when, they had neither filed an appeal nor any cross-objections under Order 41, Rule 22(1).

12. Another case cited by the learned counsel was the case of -- 'Dinanath Chandra v. Sudhanyamoni Dasi', AIR 1935 Cal 458 (B). In that case a decree was passed in a suit for enhancement and the tenants filed an appeal but the landlords did not file any independent appeal or even cross-objections. The Court rightly held that the landlords had not filed any appeal or cross-objection against the decree of the first Court praying that rent be enhanced. The appeal was only by the tenants praying for reduction of rent. In such a case it was really unfair to the tenants that the rent should have been further advanced and the decree of the lower appellate Court, was therefore, rightly varied.

Order 41, Rule 33 does not authorise an appellate Court to give a decree to the respondents who have not filed any appeal or cross-objection which was refused to them by the first Court and against which they did not care to file any appeal or cross-objection. Rule 33 is applicable when a party is before the appellate Court as a respondent and the Court finds that decree ought to have been passed but it had been wrongly passed in favour of some of the respondents whereas it ought to have been passed in lavour of that party. The ruling of the Calcutta High Court relied upon by the learned counsel for the appellant does not lend any support to the contention of the learned counsel for the appellant.

13. Learned counsel for the respondent has relied upon the ruling of their Lordships of the Privy Council in the case of -- 'Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur', AIR 1916 PC 182 (C). In that case a suit for rent under a lease executed by four trustees, was instituted by three of them impleading the non-consenting trustee as defendant. The trial Court erroneously gave a decree for the plaintiffs and the defendant-trustees in their respective shares and the defendant-trustee did not appeal. It was held that the appellate Court had power to vary the form of the entire decree even as regards the non-appealing trustee, as the entire decree of the trial Court was brought up before the appellate Court.

In the present case the entire decree of the first Court was brought up before the lower appellate Court and all the parties were before it Having found that a decree ought to have been passed in the case but in favour of Kishenchand respondent and not in favour of Harkishendass respondent, the Court was, therefore, perfectly entitled to pass a decree in favour of the rightful plaintiff who was a party to the appeal although he had not filed any appeal or cross-objections against the decree of the first Court. By the suit it was the purpose of both the plaintiffs that a decree should be passed against the defendant either in favour of plaintiff 1 or in favour of plaintiff 2, but the first Court gave a decree in favour of plaintiff 1 and the purpose of both the plaintiffs was served. Plaintiff 2, was, therefore, not aggrieved by the decree and had no reason to file any appeal or cross-objections against it.

When, however, the lower appellate Court found that the decree could not be given in favour of Havkishendass plaintiff 1, it was perfectly justified in giving a decree in favour of Kishenchand plaintiff 2. I do not find any force in the arguments of the learned Counsel for the appellant on this point also.

14. The only other argument which was advanced is that the first Court had not allowed any costs to Harikishendass and although he had filed cross-objections in the first lower appellate Court, decree for costs ought not to have been given to Kishenchand when the decree in favour of Harikishendass was set aside. Learned counsel for the respondent concedes that the lower appellate Court was wrong in passing a decree for costs in favour of Kishenchand plaintiff 2. In the circumstances of the case, the lower appellate Court's decree is liable to be set aside to that extent.

15. The appeal is partly allowed. The decree of the lower appellate Court for the recovery of Rs. 2080/- in favour of Kishenchand plaintiff 2, against Chotteylal defendant is maintained. The decree for costs of the first Court passed by the lower appellate Court is set aside. The respondent Kishenchand shall get the costs of this appeal from Chotteylal appellant.